SUPREME COURT OF THE UNITED STATES.

No. 539.

GEORGE W. JONES, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS. FILED 14TH OCTOBER, 1876.

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PETITION FILED APRIL 8, 1871.—J. R.

In the United States Court of Claims.

December Term, 1871.

GEORGE W. JONES
vs.
THE UNITED STATES. } No. 6311.

Your petitioner, George W. Jones, a citizen and resident of the city of Cincinnati, State of Ohio, humbly petitioning the judges of the Court of Claims, respectfully represents:

On the 1st day of June, A. D. 1864, he entered into a written contract with the United States (a copy of which is hereto annexed and made a part of this petition, marked A,) to deliver two hundred thousand yards of D. B. cloth, at two dollars and nine cents per yard, to the quartermaster of the United States at Cincinnati, Ohio, at the times and in the quantities specified in said contract. That in accordance with the terms of said contract, your petitioner delivered 122,190 yards of cloth. That on the eighth day of August, 1864, the mill at which said cloth was being manufactured was destroyed by fire, and your petitioner was thereby prevented from delivering the remaining number of yards of said cloth—to wit, 77,809 yards—at the time required by said contract. That on the 23d day of November, 1864, the petitioner wrote to Colonel W. McKim, the quartermaster at Cincinnati, Ohio, stating that by reason of the causes aforesaid, he was prevented from complying with the terms of the contract, so far as making the deliveries at the times mentioned in said contract was concerned. That after waiting some time for an answer, and getting none, your petitioner went to Washington city, and applied personally to the proper officer of the quartermaster general's department (the chief of the clothing bureau) on the 25th day of February, 1865, and made known the circumstances to the said department, and asked to be relieved from a further fulfillment of his contract. In this your petitioner was not successful, the officers of said department insisting that the goods must be furnished, but at the same time stating that sufficient time would be allowed to deliver them.

Your petitioner further states, that after much effort, and at large expense, he succeeded in making a contract with responsible parties to manufacture the remaining quantity of cloth due from him to the United States. That on the 4th day of April, 1865, your petitioner wrote a letter to Colonel Moulton, then in charge of the Cincinnati depot of the quartermaster's department, offering to deliver a portion of the cloth during that month (April), and the balance within four months, which letter, tendering the cloth as aforesaid, your petitioner is informed was transmitted by said officer to the quartermaster general, with his favorable recommendation. That on the 27th day

of April, 1865, your petitioner tendered to the said Colonel Moulton seventeen cases, containing 51,801½ yards of cloth of the kind contracted for, which said Colonel Moulton refused to accept. That at the time of said refusal to receive the cloth thus tendered, the said Colonel Moulton gave your petitioner notice that no more cloth would be received from him upon said contract, and that he could not be allowed to complete the said contract.

Your petitioner further represents, that on or about the first day of May, 1865, he presented the whole matter, by letter, to the quartermaster general, asking that the said quartermaster general would permit your petitioner to complete his said contract. But your petitioner says that he was not permitted to go on with the completion of his contract.

Your petitioner further represents, that upon being notified that the department would not receive the cloth tendered by him (which had been manufactured and purchased under the arrangement heretofore stated), your petitioner sold, in open market, and at the best market rates, the said 51,801½ yards of cloth, for which he realized the sum of $54,508.88.

Your petitioner further saith, that in addition to the last aforesaid number of yards of cloth, there still remain due upon the contract 25,681½ yards of said cloth. But upon being notified by the quartermaster at Cincinnati that he would receive no more cloth under the contract, your petitioner, at large expense, succeeded in arranging with the manufacturer of said cloth to release him (your petitioner) from the purchase of the said last number of yards—to wit, 25,681½.

Your petitioner further saith, that according to the contract aforesaid, the United States agreed to pay to your petitioner $2.09 per yard for said cloth. That the number of yards tendered and refused to be received, was 51,801½ yards, which, multiplied by $2.09 per yard, makes the sum of $108,275.13. That the proceeds of sale, as aforesaid, of the 57.801½ yards amounted to $54,508.88, leaving due to your petitioner the sum of $53,766.25. Your petitioner avers, that the said sum of $53,766.25, by reason of the premises aforesaid, remains due to your petitioner, and unpaid. That he has made application to the War Department for payment of the said sum, and payment was refused. That he has at all times borne true allegiance to the Government of the United States, and that he has not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government. He therefore prays judgment of your honorable court for the said sum of $53,766.25, and for such other and further relief as the nature of the case may show he is entitled to.

CHIPMAN, HOSMER & CO.,
Attorneys for Claimant.

WASHINGTON, D. C.

CERTIFICATE.

CITY OF WASHINGTON,
District of Columbia, ss:

A. A. Hosmer, being duly sworn, deposes and says that he is one of the attorneys of the claimant in the foregoing petition. That no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made, except as in the petition stated. That the claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; and that he believes the facts, as stated in said petition, to be true.

A. A. HOSMER.

Subscribed and sworn to before me this 5th day of April, 1871.
[SEAL.] R. H. MARSH, *J. P.*

EXHIBIT A.

Articles of Agreement made and entered into, on the first day of June, anno Domini one thousand eight hundred and sixty-four, between Captain C. W. Moulton, assistant quartermaster United States army, of the first part, and George W. Jones, of Cincinnati, Ohio, of the second part.

This agreement witnesseth that the said Captain C. W. Moulton, assistant quartermaster United States army, for and on behalf of the United States of America, and the said George W. Jones, for himself, his heirs, executors, and administrators, have covenanted and agreed, and by these presents do mutually covenant and agree to, and with each other, as follows, viz.:

First. That the said George W. Jones, of the second part, shall have manufactured and delivered to the United States depot of army clothing and equipage, in Cincinnati, Ohio, by or before the fifteenth day of December next, the following articles, to wit: Two hundred thousand (200,000) yards of dark blue uniform cloth.

Second. It is agreed that all the above-named articles shall be according to the sealed sample, now at the inspection depot in Cincinati, Ohio, and to be delivered in good new packages.

Third. It is agreed that deliveries of the above-named articles shall and will be made as follows: 5,000 yards to be delivered in June, 25,000 yards in July, 25,000 yards in August, 35,000 yards in September, 50,000 yards in October, 50,000 yards in November, and 10,000 yards on or before December 15th, 1864.

In case of failure on the part of the party of the second part to deliver the articles within the time and in the manner specified in this agreement, the party of the first part is authorized to make

good the deficiency by purchase in the open market, at the expense of the said party of the second part.

Fourth. It is agreed that the articles, upon being delivered, shall be examined and inspected without unnecessary delay, by a person or persons appointed by the United States; and after such inspector shall have certified that they are in all respects as contracted for and fully equal to the samples aforesaid, they shall be received and become the property of the United States, and all such articles as may be condemned and rejected by said inspector, shall be removed from the depot within ten days after the contractor shall have been notified of said rejection.

Fifth. It is agreed that for and in consideration of the faithful fulfilment of the above stipulations in all their parts, the party of the first part agree that the party of the second part shall be paid by the United States at the office of army clothing and equipage, Cincinnati, Ohio, as follows, viz:

At two dollars and nine cents ($2 09) for each yard of dark blue uniform cloth like sample, delivered as herein stated Payment to be made for each delivery, should Congress have made an appropriation for that purpose, or as soon thereafter as funds may be received, withholding ten per cent. from each payment until the whole quantity shall have been delivered and the contract be completed; and in the event of defalcation or non-fulfilment thereof, in any of its parts on the part of the party of the second part, said ten per cent. shall be and is hereby forfeited to the United States.

Sixth. It is further agreed and expressly conditioned, that no member of Congress is, or shall be, admitted to any share or part of this contract or agreement, or to any benefit to arise therefrom; that it is not transferable without the consent of the proper authority; that any sale, transfer, or assignment of it without such consent having been obtained (except under a process of law) shall and will be considered an abandonment of it, and the said party of the second part, his or their securities, be held responsible for all the loss, delay or damage to United States, which may arise from such abandonment.

In witness whereof, the parties have hereunto set their hands and seals in quintuplicate this first day of June, 1864.

GEORGE W. JONES.
C. W. MOULTON,
Capt. and A. Q. M.

In the Court of Claims of the United States.

December Term, A. D. 1872.

GEO. W. JONES
vs.
THE UNITED STATES. } No. 6311.

And now comes the Attorney General, on behalf of the United States, and makes answer to the petition of the claimant herein; and,

not confessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimant in the sum of fifty-three thousand seven hundred and sixty-six dollars and twenty-five cents, says that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, denies the said allegation.

JOHN GOFORTH,
Assistant Attorney General.

Filed June 4, 1873.

In the Court of Claims of the United States.

December Term, 1873.

GEO. W. JONES
vs.
THE UNITED STATES. } No. 6311.

PLEA.

Now come the defendants, by their Attorney General, and say that the claimant herein should not further have or maintain suit against the defendants for the reason that the petition of the claimant was not filed in this court nor transmitted to it within six years after the claim therein set forth first accrued.

Wherefore the defendants ask judgment, &c.

JOHN GOFORTH,
Assistant Attorney General.

Filed August 24, 1874.

In the Court of Claims.

GEO. W. JONES
vs.
THE UNITED STATES. } 6311.

At a Court of Claims held at the Capitol, in the City of Washington, the first day of June, A. D. 1876, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said claimant's petition be dismissed.

By the Court.

A true copy of record.

In the Court of Claims.

December Term, 1875.

GEO. W. JONES
vs.
THE UNITED STATES. } No. 6311.

Comes now the petitioner in the above-entitled cause, and by his attorneys moves the court for the allowance of an appeal to the Supreme Court of the United States from the judgment dismissing the petition in the above-entitled cause, rendered by the Court of Claims on the first day of June, 1876.

CHIPMAN & HOSMER,
Attorneys of Claimant.
WM. RICHARDS,
Of Counsel.

Filed July 15, 1876.

At Chambers.
Allowed.

C. D. DRAKE, *C. J.*

Court of Claims.

GEO. W. JONES
vs.
THE UNITED STATES. } No. 6311.

FINDINGS OF FACT.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

1. That the contract annexed to the petition was made, at the date thereof, between C. W. Moulton, captain and assistant quartermaster, on the part of the United States, and George W. Jones.

2. That, at the making of said contract in the name of George W. Jones, the parties interested therein were John D. Jones, Caleb Jones, George W. Jones, and F. G. Huntington, copartners in trade, and thereafter the said Caleb Jones sold his interest in the contract to George W. Jones & Co., and the said Huntington sold his interest in said contract to George W. Jones personally.

Under the contract and previous to October, 1864, there were delivered by said George W. Jones to the United States 122,517¼ yards of the cloths, for which the United States paid to said Jones the contract price, excepting ten per cent. reserved by them according to the provision of the contract.

In August, 1864, the mill in which the cloths were manufactured was destroyed by fire, and thereupon the said George W. Jones failed to make deliveries according to the contract, and Captain Moulton called said Jones' attention to the fact, and notified his bondsmen that he should proceed against the said Jones for his delinquency.

In 1864, and till about the close of the war, cloths like those contracted for were not in the market; they were made on contract; and from August, 1864, to February 1, 1865, the mills that manufactured them were under contract and running to their capacity.

On the 23d November, 1864, the said George W. Jones, by letter of that date, applied to Colonel McKim, who was then in charge of the depot for clothing and supplies at Cincinnati, stating that he was unable to furnish the remaining 77,806¼ yards of cloth not delivered, and asking that he be released from the obligation, and that the ten per cent. reserved, amounting to $25,538.46, be paid to him.

That in February, 1865, the said George W. Jones went to Washington for the purpose of applying to the Quartermaster's Department for a release from the unfinished part of said contract. And upon application to the Quartermaster General the said Jones was referred to Captain Perry. Captain Perry stated to said Jones that there was no power out of Congress to release him, and that he must furnish the goods, and that upon application to Colonel Moulton sufficient time would be allowed to deliver them.

About the first or second week of March, 1865, said George W. Jones contracted with F. M. Ballou & Co. to manufacture the cloths required to fill said Jones's contract with the Government at $2.12½ per yard, and under that contract there was delivered to said Jones by said F. M. Ballou & Co., 51,801½ yards of said cloths.

On the 4th of April, 1865, George W. Jones applied, by letter of that date, to C. W. Moulton for permission to complete the contract between the United States and said Jones, and his letter was referred by Captain Moulton to the Quartermaster General at Washington; and by letter, dated April 22, Captain Moulton was informed that the Quartermaster General could not authorize "the release from contract, the extension of time for the delivery of articles under contracts already expired, nor any action whatever not in accordance with the terms and conditions of existing contracts."

In the spring of 1865, and about the time of the capture of Richmond, the contracting for or purchasing of dark blue and army cloths was stopped at the depot in Cincinnati, and cloths like those contracted for could have been purchased then at about half the price they would have commanded during the preceding winter months of that year; and in the New York market there was no sale for such cloths at over about 75 cents a yard.

On or about the last of April, 1865, the said George W. Jones, under his contract with the United States, tendered to Captain Moulton, (who had succeeded Colonel McKim,) at the quartermaster's depot in Cincinnati, 17 cases containing 25,899¾ yards of said cloths, and Captain Moulton refused to receive them because the time for deliveries under said contract had passed, and he had

no notice of the time of the contract having been extended, and he ordered the cloths to be put back, which was done.

After the refusal of Captain Moulton to receive the cloths tendered to him by said Jones, as above stated, the said Jones sold the said 51,801½ yards of cloth delivered to him under his contract with F. M. Ballou & Co. for $54,503.88, and the prices obtained therefor in such sale were the fair market prices at the time.

In May, 1865, the amount of 10 per cent. on the price of cloths delivered under the contract which had been reserved by the United States under the provision of the contract, was paid to the said Jones.

We find as conclusions of law—

I. That the allegation of the petition that the time specified in the contract for the delivery of the cloths by him was extended, is not proved, inasmuch as the remarks of Captain Perry to the petitioner that "upon application to Colonel Moulton sufficient time would be allowed to deliver them" might have been only the expression of Captain Perry's opinion as to what Colonel Moulton would do.

II. The written contract annexed to the petition could not be altered by the verbal agreement of Captain Perry to extend the time for the delivery of the cloths.

By the Court.

Filed March 18, 1876.

LORING, J.:

The statement of facts shows that this is one of the many cases of contracts for military supplies remaining unperformed at the sudden termination of the war, when the need of the United States for such supplies ceased.

By the burning of the mills in which the cloths contracted for were manufactured the petitioner was prevented from furnishing them within the time specified in the contract; and that brings up the question whether the time specified was of the essence of the contract when it was made.

By the theory of the common law a contract offers but one alternative, viz., performance or damages; and, therefore, at the common law, time, like every other term of a contract, is essential to it; and the failure of one party to perform in the time specified absolves the other from his obligations under the contract.

And as time is essential in military operations, it is essential in a contract for the means of carrying them on. And the parties in this case knew that the need of the Government for the cloths contracted for grew out of the existing war, and would cease whenever the war ceased; and, therefore, under the rule of law and the circumstances in which the contract was made, we think that the time specified in it for the petitioner's performance was of the essence of the contract, and that his failure to tender the cloths within that time absolved

the United States from their obligation under the contract to receive them.

But the petitioner alleges that after the time specified for his performance in the contract had expired he was by a verbal agreement with Colonel Perry duly authorized to complete it, and did so, and is therefore entitled to the price he claims. This is the allegation of the petitioner, and the burden of the proof belongs to him, and we think the proof is not made with the certainty that would entitle him to judgment.

Where a party to a written contract claims to bind the other, beyond its terms, upon a few spoken words of his agent, the party claiming should show that the only reasonable inference from the words spoken, and their circumstances, is the meaning and purpose he claims for them. For the written contract establishes one mutual intent between the parties to it, and that must stand till another mutual intent is substituted for it. And if the spoken words are capable of more than one inference, and thus are doubtful, it is incumbent on the party who seeks to use them to ascertain that doubt, which he can always do.

The circumstances of the case are that the petitioner's contract was made with Colonel Moulton, at Cincinnati, and was to be performed there, in his local jurisdiction, and under his official authority; and he was in a position to know the circumstances of the case, which Colonel Perry could only know from the statements of the contractor himself. In such a case the transmission of the petitioner's application by Colonel Perry to Colonel Moulton for his action, to whom it especially belonged, was a propriety so manifest, and so according to military usage, that it, of itself, furnished a presumption that that was Colonel Perry's intent. And we think the words spoken are consistent with that intent.

The facts are found that, in February, 1865, the petitioner came to Washington and applied to the Quartermaster General to be released from the unfinished part of his contract; and that he was referred by the Quartermaster General to Colonel Perry, then chief of the Bureau of Clothing, &c., at Washington. But this reference was made by the Quartermaster General without any special directions from him to Colonel Perry; and thus it merely transmitted the petitioner's application to Colonel Perry, to be disposed of by him in the exercise of his discretion within the limits of his general official authority.

Then Colonel Perry said to the petitioner that there was no power out of Congress to release him from the contract, and that he must furnish the goods, and that upon application to Colonel Moulton sufficient time would be allowed him.

In saying that there was no power out of Congress to release the petitioner from his contract, and that he must furnish the goods, Colonel Perry only stated correctly the law and its consequences. No statute authorized him to release a contract of the United States, and until the contract was released its terms bound the petitioner. His failure as to time did not release him from such performance as

remained, and this it was Colonel Perry's duty to require. And as to the law and its consequences, it is manifest from the nature of the subject that Colonel Perry was only stating his belief and opinion. And we think that in the rest of the sentence, "that upon application to Colonel Moulton sufficient time would be allowed to deliver them," Colonel Perry only meant to express his belief and opinion as to the result of the application he directed, for there is nothing in Colonel Perry's words that indicates the intent of any action by him, and on the evidence there was no action whatever on the part of Colonel Perry beyond the words spoken to the petitioner, and these expressly referred the petitioner to Colonel Moulton as the means of and official procedure for obtaining the extension of time. And these means being express, the petitioner had no reason or right to infer any other, or to extend the words spoken to him, by his own implication, beyond the application to Colonel Moulton, to which he was referred.

Colonel Perry's reference of the petitioner to Colonel Moulton shows that such application was considered the first step to be taken, and the statement of facts shows that when the petitioner made his application to Colonel Moulton, he referred this extra-official matter of the extension of time and alteration of a contract to the Quartermaster General for his decision; and this it is to be assumed was the ordinary course of military procedure in so exceptional a case, and therefore what Colonel Perry may be presumed to have contemplated. And as the war was still going on and the need of the cloths continuing, Colonel Perry's opinion that the cloths would be accepted and his expresson of that opinion were incident to the circumstances of the time and the petitioner's application to him.

And if the words of Colonel Perry are equally capable of the inference we have drawn from them and of that claimed by the petitioner, viz., an absolute undertaking by Colonel Perry on his own sole authority for an extension of time, then the petitioner has not proved his allegation that after the time specified in the contract for his performance he was duly authorized to complete it.

And we think that there is nothing in the evidence that suggests that the petitioner understood the words of Colonel Perry to be an undertaking for, or grant of, an extension of time then made, or that the petitioner acted on them.

The statement of facts finds that after the petitioner had learned that he could not be released from his contract, he made a new contract for the manufacture of 77,809 yards of cloth remaining to be delivered under the contract, at $3\frac{1}{2}$ cents per yard beyond the contract price, and thus in excess of that by $2,623. But by performance he was to get $25,538, which was the amount then reserved of the contract price on former deliveries. And moreover, the contract provided that on default of delivery by the petitioner the United States might purchase the cloths in the market, and this would be much more costly to him than his own procurement of them; and by performance and the acceptance of his cloths he was to escape the liability for damages already incurred and secure the contract price.

To perform the contract, which was still binding on him, was, therefore, the course his interests dictated at the time, and then there was no reason to doubt that the cloths would be accepted, and, undoubtedly, if the war had continued they would have been accepted. But the sudden termination of the war altered altogether the position of the parties, and has brought them into litigation here on their strict legal rights; and on those we think the petitioner has not proved the allegation on which he rested his case with sufficient certainty to entitle him to judgment.

But if it were proved that Colonel Perry's words were intended to make and did make an absolute verbal agreement for an extension of time beyond that specified in the written contract, we think it would be invalid under the statute of 2d June, 1862, which requires contracts for military supplies to be in writing.

The act of June 2, 1862, is a statute of frauds, and as clearly so as the statute of 29 Charles 2. Both have the same purpose, viz., the prevention of frauds. Both use the same means, the requirement of writing, and both have the same legislative authority, and both are subject to the same reasons and rules of construction; for in both the object of construction is the same, viz., to ascertain the legislative intent in requiring written evidence.

The rule of the common law, which makes parol evidence inadmissible to alter a written contract, results from the classfication the common law makes of the different species of evidence, by which the superior quality is made to prevail over the inferior. But the common law does not seek to prevent parol contracts or to preclude the evidence proper to them, and, therefore, at the common law a written contract may be altered by a subsequent verbal agreement complete and valid in itself, and either altering the terms of the original contract or taking its place.

But the statute of frauds is a positive enactment, requiring certain contracts to be in writing, for reasons of public policy; and where, like the act of 1862, it requires the contract to be in writing, that means the whole contract, and necessarily excludes any alteration of it, or substitution for it, by a subsequent verbal agreement. Different decisions have been had in different States under their respective statutes, but the rule for courts of the United States in the construction of the statute of frauds as to its requirement of a writing, has been fixed by the decision of the Supreme Court in Swain *vs.* Seaman, (9 Wallace, 254.) The contract there was held to be executed between the parties, and, therefore, not within the statute of frauds; but in stating the rules under that, the Court said as follows:

"The better opinion is that a written contract, falling within the statute of frauds, cannot be varied by any subsequent agreement of the parties unless such new agreement is also in writing. Express decision, in the case of Marshall *vs.* Lynn, (6 M. & N., 109,) is that the terms of a contract, falling within the operation of the statute of frauds, cannot be altered or varied by parol; that where a contract for the bargain and sale of goods is made, stating a time for

the delivery of them, an agreement upon another day for that purpose must, in order to be valid, be in writing."

This adoption by the Supreme Court of the English rule, under the statute of frauds, makes it the rule for us in the case it specifies—that of a verbal agreement to extend the time of performance, specified in a written contract, required by statute to be in writing; and that is the very case on which the petitioner claims. It may be true that the case at bar is not within the English statute of frauds, for it is not merely a contract of sale, but is also for the manufacture as well as the sale of the cloths. But the case is within the statute of June 2, 1862, for that in its terms embraces all contracts, and is thus absolute in its requirement of writing, and in its exclusion of parol evidence, as to all contracts for military supplies, as the statute of frauds is for the contracts it specifies.

And the act of 1862 is much more stringent than the seventeenth section of the statute of frauds, requiring for the sale of goods and merchandise a note or memorandum in writing; for that section provides that the acceptance of part of the goods shall take a contract out of the statute; and under a written contract for the sale of goods, if there has been a delivery and acceptance of part, and thus a part performance, the contract is by that discharged from the statute, and remains only under the common law, at which a subsequent verbal agreement in alteration of, or in substitution for, the orignal contract may be valid. But the act of 2d June, 1862, makes no provision for an acceptance of a part of the goods, giving validity to the contract, or taking it out of the statute, and therefore it can have no such effect. Its requirement that the contract shall be in writing is unqualified, and it follows necessarily that there can be no alteration of it or substitution for it by any subsequent verbal agreement, for if that is taken as part of the original agreement then the whole of that is not in writing; and if the subsequent verbal agreement is taken as a new contract, then no part of that is in writing, and is, therefore, invalid under the statute. And in analogy to this and in affirmation of it, it has always been held in England and in this country, under the sections of the statute of frauds, as to the sale of lands, promises to pay the debts of another, and promises not to be performed within a year, &c., that as these sections make no provision for part performance, that, if proved, does not take the contract out of the statute, or tend to its validity. On this point all the decisions have been uniform, and all are authorities, that part performance does not take a contract out of the act of 2d June, 1862, or give validity to a verbal contract within its purview. We think it immaterial, therefore, that in this case part of the cloths had been delivered.

And that the act of June 2, 1862, (12 Stat., 411,) is a statute of agency as well as a statute of frauds, is no reason why it should not be construed according to the rules established by the Supreme Court for the construction of the statute of frauds; on the contrary, the efficiency of the act of June 2, 1862, for its important purposes as a statute of agency, depends upon its being so construed.

The first section of the act of 2d June, 1862, requires the Secretary of War and of the Navy and of the Interior to cause every contract made by them, or their officers under them appointed to make contracts, to "*be reduced to writing*," &c.. and filed in the returns office.

The second section requires the officer making such return to verify it by his oath, under the pains and penalties of perjury.

The third section makes the officer's omission to make such return a misdemeanor, punishable by fine and imprisonment.

The fourth section establishes a returns office in the Department of the Interior, with clerks and records, and makes copies of the records legal evidence in all prosecutions under the act.

And the fifth section prescribes that every officer appointed to make contracts shall be furnished with a printed letter of instructions, setting forth his duties under the act.

Thus the act establishes a system for the making in writing and recording, and safe disposition, of contracts made in the Department of War, of the Navy, and of the Interior. And it is these Departments which make the contracts on which must depend the efficiency of the Army and Navy in peace and in war, and the security of our Indian borders. And the purpose of the system is to keep those Departments informed, with reliable certainty, of what provision has been made and what provision is needed to be made for their operations. And it is manifest that this purpose, as well as the purpose of preventing frauds by collusion between officers and contractors, and all other purposes of the statute, would be defeated if quartermasters all over this extended country could alter the written and recorded contracts of the Government by subsequent verbal agreements between themselves and contractors.

Thus the integrity and efficiency of the system require that the act of 1862 should be construed as the statute of frauds is construed in relation to the alteration of written contracts by subsequent parol agreements.

And statutes are not construed by the names they may have acquired in practice, but by their terms, and in reference to the legislative intent those manifest. And the only reason for the construction fixed upon the statute of frauds is, that its requirement of a note or memorandum in writing is mandatory; and the requirement that the contract shall be in writing is just as mandatory in the statute of 1862. And in case after case, since the enactment of that statute, we have held contracts for supplies invalid because not made in writing.

And if the rules of construction which belong to the statute of frauds are to be applied to the statute of 1862, and the legislative intent of that act is to be taken to be what it requires, that contracts within it must be made in writing, we think it follows as a legal consequence that no officer and no authority in the Government, short of legislative authority, can make or authorize an alteration of a written contract which is within the act of 1862 by any verbal agreement.

And if the act of 1862 is also a statute of agency, as well as a

statute of frauds, then it is to be administered under the law of principal and agent, and by that law an express authority cannot be extended by implication; thus an authority to sell is not an authority to mortgage—an authority to sell on a day stated, at a price stated, is not an authority to agree on the day stated to sell the day after it, at the price stated; and the reason of the rule that an express authority cannot be extended by implication is, that if it could be it would cease to be an express authority, or to effect what that is intended to effect, the security of principals. And if any authority could be in fact and legal effect an express authority, it would seem to be a contract of the United States, written and recorded under statute requirements, and then committed for the supervision of its performance to their officers, who by the law of agency peculiar to the Government can bind it only to the extent of the authority actually given to them.

The learned counsel for the petitioner cited to us the case of Salomon *vs.* The United States, (19 Wall., 17,) appealed from this court. But that case differs widely from this. There the officer of the United States accepted the goods contracted for, when delivered, after the time specified in the contract; and it never has been questioned under the common law or the statute of frauds that delivery and acceptance upon a written or verbal contract, or a written or verbal alteration of either, changed the property in the goods and entitled the seller to his price; for that is the legal effect of delivery and acceptance *per se*, and the price may be recovered on a *quantum meruit*, irrespective of the contract, as held by the Supreme Court in Emerson *vs.* Slater, (19 How., 224.)

And the statute of frauds has no application to such a case, for the statute regulates only the terms of a contract, and delivery and aceptance are no part of the terms of a contract, but constitute performance; and that is left to its effect at common law. Where a party to a contract, written or verbal, accepts goods at the time fixed by it for their delivery, it is performance according to the contract. Where a party accepts the goods before or after the time fixed, it is a performance received by him in accord and satisfaction of the performance stipulated for in the contract; and what the case of Salomon *vs.* United States decides is that an officer of the United States may effect for them such accord and satisfaction in the circumstances of that case. And there the contract for supplies grew out of the war, and the war was flagrant, and the supplies needed, at the time of the delivery and acceptance, and the principal's assent, therefore, might be presumed from his interest. But that is a very different case from a verbal agreement to accept the goods at some future time; for what may then be the position and interests of the principal cannot be foreseen.

The difference between the two cases is that in this there was a verbal agreement altering a contract required by the statute to be in writing, while in Salomon's case there was a performance of the contract by delivery and acceptance, to which the statute did not relate. And in their opinion the Supreme Court said as follows: "The act

of 1862, requiring contracts for military supplies to be in writing, is not infringed by the proper officer having charge of such matter accepting delivery of such supplies after the day stipulated." This places the decision of the case on the facts of delivery and acceptance, and to the words quoted there were added these: "Nor is a verbal agreement to extend the time of performance invalid." This is the rule of the common law as stated in the case of Emerson *vs.* Slater, (22 How., 42,) and counsel had cited that case and its rules, and we think the words quoted refer to a rule of law mooted by counsel, but not to a rule under the statute requiring contracts to be in writing.

And taking together the two cases in the 9th and 19th Wallace, we do not understand them to decide that a verbal alteration of a written contract cannot be made where a statute requires a note or memorandum in writing, and that such verbal alteration may be made where the statute requires the contract to be in writing.

The judgment of the court is that the petition be dismissed.

NOTT, J., concurring:

Judging this case by the ordinary principles of mercantile law, without regard to the conditions which a statute of frauds may impose upon it, I think that the responsible agent of the Government—the chief of the clothing bureau—was free to do one of three things when the contractor came to him acknowledging his default and asking to be relieved from the obligations of the contract: 1st, he might have annulled the contract, and told the contractor that he would receive nothing more from him; or, 2d, he might have declared the contract forfeited, and have gone into the market and purchased the cloth, charging the contractor with the difference in cost; or, 3d, he might have insisted on performance and accorded the contractor a specific, or, in the absence of a specific, a reasonable time to fulfill his obligation.

The facts found show that the Government did not wish to resort to the first or second of these alternatives. It needed the cloth, yet it could not avail itself of the right to buy such cloth in the market, for the facts show that no such cloth could at that time be bought. This had been represented to the chief of the clothing bureau, and he doubtless knew it apart from such representation. It is, therefore, not surprising that he chose the remaining alternative and insisted on performance. When he made that election, amid the peculiar circumstances of the case, and the contractor proceeded in good faith, with all possible diligence and at a positive loss, to procure the cloth, the arrangement thus acted upan would have fixed the rights and liabilities of the parties, if not prohibited by the statute of frauds.

As to the peculiar terms of this arrangement, I deem them entirely immaterial. In all such cases a purchaser must stand upon one ground or the other. It is perfectly well settled that if such a party recognizes the continuing obligations and existence of the contract,

he thereby waives a forfeiture. When the chief of the clothing bureau, with full knowledge of the facts of the misfortune which had prevented due performance; of the impossibility of procuring such stock in the market; of the necessity of procuring its manufacture, if it was to be furnished at all; and, knowing these facts, said in effect to the contractor: I cannot release you from your contract; I will not now assert a forfeiture; you must proceed to perform by procuring the cloth; he thereby extended the period of performance for a reasonable time, and continued the obligation of the Government to receive the cloth if it was tendered within the same reasonable period, provided always that he had legal authority to enter into such an arrangement by parol.

It is undoubtedly true that, after the original time of performance had passed, the Government would not have been bound to the acceptance of the cloth, though it might not have asserted a forfeiture nor have enforced a penalty. In other words, while waiving the forfeiture it might have annulled the contract. But this was precisely what the chief of the clothing bureau refused to do. He did not say to the contractor, you are too late; the Government will not receive your cloth; but, on the contrary, he did say, as is found by the court, "You *must furnish the goods.*" The Government, therefore, is in this position: it did not avail itself of its reserved right and buy the goods in the market; it did not declare the contract at an end, and relieve the contractor from performing and itself from the obligation of receiving, but it did compel the contractor to go on and perform, with knowledge of the loss it was inflicting upon him, and with the assurance that a reasonable time would be allowed him to do that which it then and there compelled him to do.

With regard to this assurance of the chief of the clothing bureau, viz., "*that, upon application to Colonel Moulton, sufficient time would be allowed to deliver the goods,*" it needs only to be remarked that the chief of the bureaa was the authoritative agent of the Government in this business, (13 Stat. L., p. 294, § 1,) and that Colonel Moulton, the depot quartermaster, was his mere subordinate, with no authority or discretion in the matter. It was the ordinary military official way of saying that the goods must be furnished, and Colonel Moulton would be directed to award sufficient time in regard to the delivery. If there was any obligation to confer with the depot quartermaster, it rested on the chief of the bureau and not on the contractor. The matter had already been referred by the depot quartermaster to his superiors, and it was out of his control until his superiors sent it back to him. When the chief required the contractor to go on and furnish the goods, he himself thereby accorded to the contractor a sufficient time to do it in, and the reference to his subordinate was mere surplusage, which could not take away the legal consequences of his requirement.

The general principles of mercantile law require that when a man agrees to furnish goods by a day certain he must do so, or the other party will be released from the obligation of receiving them. But mercantile law does not allow the purchaser to entangle the delin-

quent contractor in fresh risks and obligations, and then abandon the position which he, the purchaser, has assumed. The latter may not impose needless loss or injury upon the other. The obligations of good faith and fair dealing remain as strong as at any other period of the transaction. In the great majority of cases in daily life it is also for the interest of the purchaser to secure tardy performance, rather than to be compelled to seek redress through legal proceedings. The law protects and fosters such amicable arrangements. It does not allow the purchaser to extend the time one day and repudiate the arrangement the next. It does not authorize him to throw the burden of performing upon the other party, and then shift his ground and say that the other has performed in his own wrong. If such license were allowed it would destroy all certainty in this class of commercial transactions and leave the parties practically without law to restrain or guide them.

For these reasons I am of the opinion that the question in this case is simply one of statutory restriction. And upon that question I am inclined to think, though my conclusion is not free from doubt, that so long as the parol agreement of the officer was executory it imposed no binding obligation upon the Government. When the chief of the clothing bureau told the contractor he must furnish the goods, the contractor should have had the arrangement reduced to writing as required by the statute, or should have stood upon the contract and assumed the liabilities which it then imposed. Attempting to perform amid the circumstances then existing involved new risks, and those new risks would rest upon him until in a legal manner they were assumed by the Government. That assumption of the risk would have happened if the Government had accepted the goods, or if it had entered into a new contract in the manner prescribed by the statute. Neither of these events happening, the risk remained with contractor.

In the Court of Claims.

December Term, 1875.

GEORGE W. JONES
vs.
THE UNITED STATES. } No. 6311.

The attorney for the petitioner respectfully requests that additional facts may be found in this cause as follows, to wit:

I. That Caleb Jones sold his interest in the contract to the remaining partners in July, 1865, or about that time.

II. That some time in February, 1865, Colonel Moulton called said Jones' attention to the fact that the time for delivery named in the contract had passed by.

III. That about the last day of February, 1865, said Jones applied

to the Quartermaster General in Washington for relief, and that Colonel Perry was then the head of the Bureau of Clothing, Camp, and Garrison Equipage, which was the second division of the office of the Quartermaster General as organized under the act of July 4, 1864.

IV. That Colonel Perry stated to said Jones that the ten per cent. still retained on the contract would be withheld until the fulfillment of the contract, and that he would grant a reasonable time for the delivery.

V. That the shortest time in which these goods could be made was about six weeks from the time of getting the order to the beginning of the delivery, and that said F. M. Ballou & Co. began some time in April, 1865, to deliver said cloths under said contract to said Jones.

VI. That in addition to the 25,899¾ yards so rendered to Colonel Moulton said Jones had 25,901¾ yards *in transitu*, which he ordered to be stopped in Philadelphia in consequence of Colonel Moulton's refusal to receive the cloth as above stated.

Respectfully submitted.

WM. RICHARDS,
Attorney for Petitioner.

Filed March 27, 1876.

Upon the foregoing requests for additional findings of fact, the court makes the following ruling, to wit:

Allowed, except the fourth article.

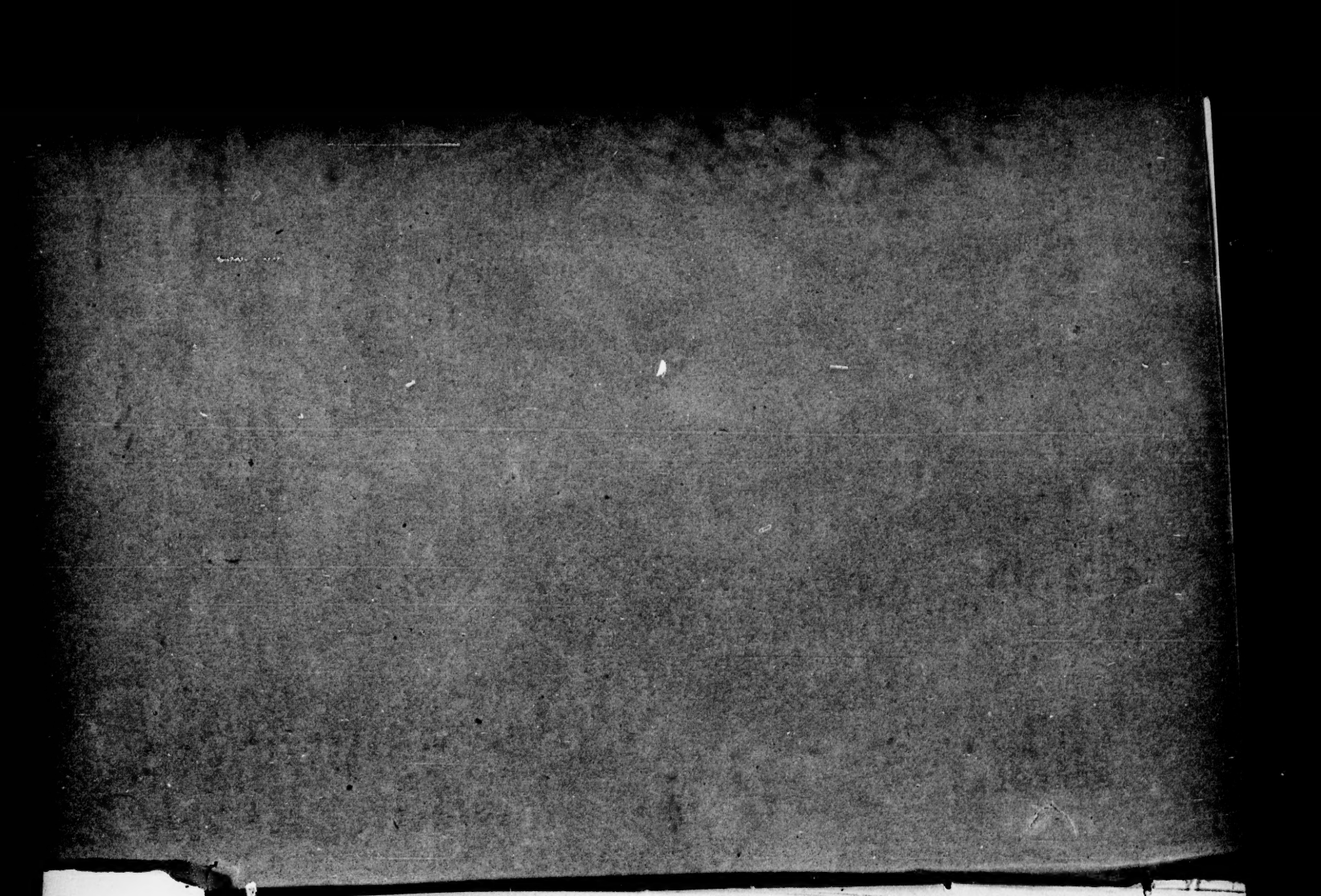
In the Court of Claims.

GEORGE W. JONES
vs.
THE UNITED STATES. } No. 6311.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon, of the application of the solicitors for claimant for the allowance of an appeal as filed in the clerk's office July 15, 1876, and of the order of the chief justice of said court allowing the same, of the findings of fact by the court and the conclusions of law thereon, of the opinion of the court and the concurring opinion, of the request of claimant for additional findings of fact, and the ruling of the court thereon.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this 14th day of October, 1876.

[L. S.] JOHN RANDOLPH,
Assistant Clerk Court of Claims.



In the Supreme Court of the United States.

OCTOBER TERM, 1877.

GEORGE W. JONES
vs.
THE UNITED STATES. } No. 539.

APPEAL FROM THE COURT OF CLAIMS.

STATEMENT OF FACTS.

The facts, as specially found by the Court of Claims, are set forth on pp. 8, 9, 10, 19 and 20 of the Record. Those of them to which the attention of the court is asked, are the following:

1. On the 1st of June, 1864, the claimant made a contract with the United States to deliver to them, on or before the 15th of December, 1864, a certain quantity of army cloth. The larger part of the cloth was delivered in accordance with the terms of the contract before October, 1864. (Rec., p. 9.)

2. In August, 1864, the claimant's mill was burned down. Cloths like those contracted for could not, from that time to the close of the war, be bought in the market. It thus became impossible for the claimant to perform a part of his contract, and a portion of the cloth was undelivered on the 15th of December, 1864. (Ibid.)

3. On the 23d of November, 1864, Jones (having then

found it impossible to complete the contract) asked by letter, which was forwarded to the quartermaster general at Washington, to be released from the obligation of making further deliveries under his contract, to which letter no reply was made.

4. The Government took no action in the matter until February, 1865—nearly two months after the expiration of the time for delivery under the contract—when Colonel Moulton, depot quartermaster at Cincinnati, called Jones' attention to the fact that the time for delivery under his contract had passed (Ibid., p. 9), and notified Jones' bondsmen that he would proceed against them for Jones' delinquency.

5. Upon receiving this notice, Jones applied in person, in February, 1865, to the quartermaster general in Washington to be released from the unfinished part of his contract, and was by him referred to Colonel Perry, who was then the head of the Bureau of Clothing, Camp and Garrison Equipage, the second division of the office of the quartermaster General. (Ibid., pp. 9, 20.)

6. Thereupon Colonel Perry stated to Jones that he must furnish the goods, and that upon application to Colonel Moulton sufficient time would be allowed to deliver them. Colonel Moulton was the depot quartermaster at Cincinnati, where the goods were to be delivered. (Ibid., p. 9.)

7. Jones thereupon promptly made arrangements, although at an additional cost to himself, to furnish the goods as he had been required to do, and in the shortest practicable time tendered a part of them, which was refused, and had a large part *in transitu* to be tendered, which was not actually tendered by reason of notice from Colonel Moulton that he would receive no more goods under the contract. (Ibid., pp. 9, 20.)

8. The United States, after the interview between Jones and Colonel Perry, when Jones was told that he must

furnish the goods, gave no notice to Jones of any change in its demands until, by reason of the close of the war, the price of the goods had fallen to less than one-half of what had been agreed to be paid to Jones. (Ibid., p. 9.)

Assignment of Errors.

Now comes the appellant, by James Lowndes, his attorney, and assigns for error the following matters in the said judgment:

1. That time was of the essence of the original contract.

2. That there was not a valid extension of the provision as to time in the said contract.

3. That the United States were not estopped by the conduct of the quartermaster from denying the existence of the contract when the goods were tendered.

4. That there was not on the facts found a new contract.

5. That such new contract was void, because not in writing.

Brief of Argument.

I. Time was not of the essence of this contract.

The rule on this point is, that in each case which arises the court will determine on the facts whether or not time was of the essence of the contract.

Mr. Benjamin thus states the rule:

"In determining whether stipulations as to the time of performing a contract of sale are conditions precedent, the court seeks simply to discover what the parties really intended; and if time appear, on a fair consideration of the language and the circumstances, to be of the essence of the contract, stipulations in regard to it will be held conditions precedent." Benjamin on Sales, p. 481.

The same rule, it seems, is meant to be laid down in Parsons on Contracts, vol. II, 659.

Also in Addison on Contracts, 184, 943, 945.

In Simpson *vs* Crippin, the defendants agreed to supply the plaintiffs with coal, to be delivered to the plaintiffs' wagons at the defendant's colliery "in equal monthly quantities during the period of twelve months from the 1st of July next." During the first month the plaintiffs sent wagons for only one hundred and fifty-eight tons of coal: *Held*, that the failure to send the wagons was not a defence, but a ground for compensation. L. R., 8, Q. B., 14.

In Slater *vs.* Emerson (19 How., 233,) the decision rested on this doctrine: "That time was an essential part of this contract is clear from the circumstances under which it is made, and the intent of the parties as expressed."

Clark's case (6 Wall., 543,) has an important bearing on this question. There the contractor failed to perform within the stipulated time, and went on to perform after it. While so doing, he suffered losses by the conduct of the Government, and brought his action for these losses. The Court of Claims decided that he could not recover, because these losses were inflicted after the time stipulated in the contract had expired. This court (by Mr. Justice Miller) said: "The contract declares no penalty for not completing the work by the 15th of July. It does not even authorize the Government to forfeit the contract, or to terminate it. The utmost that can be claimed for this failure is such damages as it may have sustained because the work was not finished in time. For this the plaintiff had given a bond, with sureties. But if the Government permitted him to go on, it surely had acquired no right to compel him to do it in a manner which involved him in a serious loss." The judgment of the Court of Claims was, on these grounds, reversed.

Inasmuch as the claimant could not recover as for a

tort, this case decides that on the facts there was a contract subsisting after July 15, which had been interfered with. The language of the court seems to imply that the original contract was held to be subsisting, because time was not of its essence.

Apply these principles to the construction of this contract.

There is proof on the face of the contract that time was not of its essence, for it contains the stipulation that *in case of failure to deliver the goods in time, the United States might purchase them in open market.* (Transcript, pp. 5, 6.)

Time is of the essence of a contract when failure to perform in time defeats the purpose of the other party. So far from that being the case here, it was evident that the object of the Government was to get the goods. It, indeed, needed the goods on the 15th of December, 1864; but it needed them also after that date.

But the action of the Government in requiring Jones, in February, 1865, to go on and furnish the goods, is conclusive proof that performance in the time limited was not deemed to be of the essence of the contract.

It is to be borne in mind that the greater part of the contract had been performed. The question here is only *whether time was of the essence of the contract as to the part of it still unperformed.* The highest diligence was shown by the appellant in getting the goods, and tender to the Government was made in the shortest possible time.

II. What passed between the claimant and the quarter master, in February, 1865, constituted a valid contract for the extension of the time stipulated by the contract.

The quartermaster at that time called the claimant's attention to the fact that the time for delivery had passed, said that *he must furnish the goods*, and that upon appli-

cation to the post quartermaster sufficient time would be allowed to deliver them. Trans., pp. 19, 9.

These facts, found by the Court of Claims, constitute a waiver of the stipulation as to time, or amount to an express contract for the extension of the time.

No new consideration is necessary to sustain a waiver, or a contract merely to extend the time for the performance of a contract. The advantage to the party granting the extension in having the contract completed is deemed a sufficient consideration.

Such an extension may be by parol in cases within the statute of frauds. That has been held by this court.

"The act of 2d of June, 1862, requiring contracts for military supplies to be in writing, is not infringed by the proper officer having charge of such matter accepting deliveries of such supplies after the day stipulated, *nor is a verbal agreement to extend the time of performance invalid.*"

Salomon *vs.* the United States, 19 Wall., p. 17.

Clark's case, above quoted, (6 Wall., 543,) may be cited to the same point. In that case a contract was held to be subsisting after the time limited for performance had expired. If it subsisted, it must either have been because time was not of its essence, or because the permission granted by the Government to go on, constituted a valid extension of the time of performance.

A agreed to send goods to B on the 1st April. He failed to do so. On April 17th B wrote to A to ask to be informed when he will send the goods. "His (A's) rights will remain unaffected if performance in these respects—*i. e.*, as to time—was waived or excused by the defendant; and this, in our judgment, is fairly deducible from the evidence. * * * This (the letter of April) waives strict performance and manifests a willingness to receive the hangings subsequently—that is, as must be understood, if shipped in a reasonable time, * * and the correspondence and acts of the parties are evidence that the defendant waived

his right to require that the entire quantity he had agreed to purchase should be shipped, and that on the first trip of the steamer in the month of April." Barry *vs.* Palmer, 9 Maine, 308.

"If the party entitled to repudiate a contract because it has not been performed in reasonable time does any act which amounts to an admission of the existence of the contract, he cannot afterwards elect to treat it as void." Brinley *vs.* Tibbett, 7 Green., 71.

Mr. Justice Nott, who on this point dissented from the opinion of the majority of the Court of Claims, took the view of the law announced in the cases cited. He used this language:

"The general principles of mercantile law require that when a man agrees to furnish goods by a certain day he must do so, or the other party will be released from the obligation of receiving them. But mercantile law does not allow the purchaser to entangle the delinquent contractor in fresh risks and obligations, and then abandon the position which he, the purchaser, has assumed. The latter may not impose needless loss or injury upon the other. The obligations of good faith and fair dealing remain as strong as at any other period of the transaction. In the great majority of cases in daily life it is also for the interest of the purchaser to secure tardy performance, rather than to be compelled to seek redress through legal proceedings. The law protects and fosters such amicable arrangements. *It does not allow the purchaser to extend the time one day and repudiate the arrangement the next.* It does not authorize him to throw the burden of performing upon the other party, and then shift his ground and say that the other has performed in his own wrong. If such license were allowed it would destroy all certainty in this class of commercial transactions, and leave the parties practically without law to restrain or guide them."

If the act of July 2, 1862, is to be treated as a statute

of frauds, such an extension of the time was not within its reason or its terms. The purpose of the statute was satisfied when the important parts of the contract had been reduced to writing.

III. But if there was not a valid contract to extend the time, still the conduct of the quartermaster creates an estoppel, and the United States cannot deny that the contract was subsisting when tender was made of the goods.

Parsons (Contracts II, 793,) thus defines estoppel *in pais:*

"When a man has made a declaration, or a representation, or caused, or in some cases not prevented a false representation, or done some significant act, with intent that others should rely and act thereon, and upon which others have honestly relied and acted, he shall not be permitted to prove that the representation was false, or the act unauthorized or ineffectual, if injury would occur to the innocent party who had acted in full faith in its truth or validity."

Mr. Fitz-James Stephen gives substantially the same definition in his Digest of the Law of Evidence, sec. 103.

What was done in this case is within these definitions. The quartermaster, at the end of February, 1865, treated the contract as subsisting, and demanded performance of the claimant. That was "the declaration," or "significant act," within the meaning of the definition. It was made with "the intent that the claimant should rely and act thereon." It was, indeed, intended to produce action on his part. The claimant "honestly relied and acted" on these words of the quartermaster. After all that passed, the United States cannot be heard to deny that the contract subsisted when tender was made.

There is no question as to the authority in the matter of the quartermaster. He had actual authority to con-

tract for these goods, and therefore had actual authority to make the demand which he did. In legal effect, it was the quartermaster general who made the demand on the claimant.

In Corliss Co. *vs.* U. S. it appears that the Secretary of the Navy stopped the contractor in his work. Subsequently they agreed upon the amount of the indebtedness of the United States under the suspended contract, and the Secretary gave the contractor a certificate acknowledging this amount to be due. On the trial the United States tried to show the real debt. It was held by the court that the Secretary had authority to fix the amount, and that the United States was bound by his action, and could not inquire into the actual amount due. 91 U. S., p. 243.

The decisions in all of the cases above cited to the point, that there may be a valid extension of the time of performance, viz.: Salomon *vs.* U. S.; Clark *vs.* U. S.; Barry *vs.* Palmer; and Brinley *vs.* Tibbett, may be regarded as having gone on the doctrine of estoppel. This seems certainly true of the last two cases.

The law of estoppel applies to sovereign as well as to citizen.

Commonwealth *vs.* André, 3 Pick., 224.
Penrose *vs.* Griffith, 4 Binney, 231.
Metz *vs.* Carpenter, 7 Cal., 527.
U. S. *vs.* Collier, 3 Bl. C. C., 325.

The reasoning of this court seems to recognize the doctrine of estoppel as applicable to the United States.

Carver *vs.* Astor, 4 Peters, 187.
Branson *vs.* Worth, 17 Wall., 32.

IV. What passed between the quartermaster and the claimant in February, 1865, created a new valid contract between the claimant and the United States.

The court below found these facts:

In February, 1865, the quartermaster called the claimant's attention to the fact that the time for delivery under the contract had passed by, (Tran., p. 19,) and gave him notice that he would proceed against his sureties, (Ibid., p. 9.) Jones thereupon went to Washington, and about the last day of February, 1865, applied to the quartermaster to be released. (Ibid., 19, 20, 9.) The quartermaster said to him that he could not release him; *that he must furnish the goods*, and that upon application to the post quartermaster at Cincinnati sufficient time would be allowed to deliver them. (Ibid., p. 9.)

These facts present all the elements of a valid contract.

To create a contract it was only necessary that there should be: 1, a request to do a particular thing; 2, a valuable consideration.

What the quartermaster said to the claimant, viz., "that he must furnish the goods," is in law an express antecedent request to the claimant to furnish them.

It can make no difference that the quartermaster supposed that there could still be performance under the original contract. If the court does not take the views submitted in the foregoing part of this argument, then there had been a breach of the original contract, and all rights under it were determined. Whatever was to be done in reference to the subject-matter of the contract was to be done *de novo*.

It would be in the highest degree inequitable upon the part of the United States after, in February, 1865, treating the original contract as in force, now to deny that it was then in force, and at the same time to rely upon the quar-

termaster's belief in the existence of the original contract to show that he did not mean to make a new contract.

A demand to do anything supposed to be a duty is not, as regards its legal effect, distinguishable from a request to do a thing not supposed to be a duty. The essential element is the same in both, viz., a wish that the thing be done expressed to the person to do it.

"Very slight circumstances will in certain cases suffice to establish a request in point of law."

Addison on Contracts, 10.

All of the acts of the claimant which caused him damage were directly the result of the quartermaster's remark to him, "that he must furnish the goods."

It is contended for the appellant that there was here a request good in law to raise a promise.

Further, there was no uncertainty about the contract, for it is evident that all said in February, 1865, was said in reference to the original contract, the terms of which became the terms of the new contract.

It makes no difference that the claimant did not apply to the post quartermaster at Cincinnati to fix "the sufficient time." The effect of the new contract was to bind the claimant to deliver the goods in a reasonable time.

The consideration of the new contract was the claimant's undertaking to furnish the goods. As goods of this kind were not on the market (Trans., p. 9,) the Government consulted its interest in making the contract. The claimant faithfully performed the new contract. Soon after his interview with the quartermaster he had contracted with manufacturers for the cloth at a price which would cause him loss under his contract. (Trans., p. 9.) He showed in this conspicuous good faith and complete reliance upon the good faith of the Government.

The goods were tendered in reasonable time. (Trans., p. 20.)

It will be observed that the Government did not after

February, 1865, signify any change in its wish to have the cloth until, by reason of the fall of Richmond, the cloth had fallen in value from $2.09 per yard to 75 cents per yard. (Trans., p. 9.)

V. It was not necessary that the new contract should be in writing.

The court below construed the act of June 2, 1862, (12 S. L., 411,) as being analogous to the statute of frauds, and as rendering void a contract not in writing.

The words of the act are as follows:

"That it shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior, immediately after the passage of this act, to cause and require every contract, made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing and signed by the contracting parties, with their names at the end thereof."

Then follow numerous directions in respect of such contracts.

It is to be observed—

1. That there is not a single word in this section, nor in any part of the act, declaring invalid or taking away the remedy upon contracts not reduced to writing. There is not the remotest analogy between the language of this statute and that of the Statute of Frauds to which it is compared.

The words of the 4th section of the Statute of Frauds are, "No action shall be brought whereby to charge, &c.;" and of the 17th section, "No contracts * * shall be allowed to be good, &c." The words of the other sections of the statute are equally strong.

The present act only makes it the duty of the heads of

Departments "to cause and require contracts to be reduced to writing."

In denying a remedy to contracts within the Statute of Frauds, where there was no writing, &c., the courts enforced the express terms of that statute.

In denying a remedy on contracts within the present statute, where there is no writing, the Court of Claims has resorted to an implication, and to one not resulting from any words in the statute.

There are no words in the statute imposing any limitation upon the power of the officer. All the formalities there prescribed are to be performed *after the contract has been made.*

2. The purpose of the act is clear.

Its title is "An act to prevent and punish fraud on the part of officers entrusted with the making of contracts on the part of the Government."

The purpose of the Statute of Frauds, according to its title and preamble, was to prevent perjury and subornation of perjury by him who set up the contract.

The duty created by the act is expressly enjoined upon the heads of departments.

Penalties are imposed by the act on the officers disregarding its provisions.

It is clear from these provisions that the act is directed only against the officers of the Government.

The construction given to it by the Court of Claims is against its express unambiguous terms, derogates by implication from the common law, and is not only a liberal construction of a penal statute, but creates new penalties and a new class of offenders.

3. The present act prescribes a number of things to be done by the officer in respect of any contract. Will the failure of the officer in any one of these acts destroy the remedy on the contract? There is no distinction made in the act between any of these requirements, and the duty

of the officer is equal in regard to all. How can a court draw the line between those which are the conditions of the remedy and those which are not?

The secretaries are to require the contracts to be reduced to writing, and "to be signed by the contracting parties, with their names at the end thereof." Under the Statute of Frauds a contract signed anywhere, or by initials, is good. Is this statute to be made by implication more stringent than the Statute of Frauds?

4. The true rule of construction applicable here is laid down in French *vs.* Edwards, 13 Wall., 511:

"There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated."

"I understand the distinction between directory and imperative statutes to be that a clause is directory when the provisions contain mere matter of direction and nothing more; but not so when they are followed by such words as are used here, viz., that anything done contrary to such provisions shall be null and void to all intents." 2 A. & E., 94.

The tendency of the courts is rather to construe away the words "null and voidable" where they occur than to find them by implication where they are absent.

"It is extraordinary that there should be cases in which it has been held that the words 'null and void' should not have their usual meaning."

Lord Denman quoted Potter's Dwarris, 223.

If the statute be construed on these principles, it will be held to have imposed upon the quartermaster the duty of having the contract, when made, reduced to writing, and his failure to do so will not be held to affect the claimant's rights already accrued under the contract.

The appellant's case is one of great hardship. He performed the greater part of his contract. He had, before October, 1864, delivered more goods than he was bound to. His failure to perform the rest of it was due to an accident which made performance impossible. He asked to be relieved from performance and received no answer for three months. Then the Government for its convenience demanded of him performance. The appellant, solely in consquence of that demand, and relying implicitly upon the promise implied in it, set himself to perform what was asked. In satisfying this demand he had to buy the goods at a greater price than that he was to receive for them from the Government. The Government again remained silent for some time. It was only when the goods had fallen in value to one-third of the contract price, and when tender of them was actually made, that the Government expressed to the claimant dissatisfaction with the new arrangement. He showed conspicuous good faith and fair dealing throughout the transaction, and his loss has been due to the act of the Government.

It would be very strange if on these facts the claimant is without a remedy in law.

It is submitted that on settled principles of law the appellant is entitled to recover, and that on the facts found judgment should have been entered for him for $53,756.25.

JAMES LOWNDES,
Appellant's Attorney.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

GEORGE W. JONES
vs.
THE UNITED STATES. } No. 539.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

GEORGE W. JONES
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APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

The contract upon which this suit has been brought was for the manufacture and the delivery *by a named day during the late war* of a large amount of army-cloth, such manufacture and delivery having, for a large part thereof, been prevented by the burning of the mills employed by the claimant, and it being otherwise impracticable for him to procure the same.

The agreement was in writing, and questions are made (1) whether the *time* specified for delivery was *of the essence* of the contract, and (2) whether certain *oral* communications bet xt the claimant and various officers of the United States amounted to an *extension*

of such time, so as to warrant certain tenders of cloth made subsequently.

1. In a contract for the manufacture and delivery of goods *by a certain day*, failure to deliver by such day *goes to the root* of the transaction.

Mr. Addison sums up the authorities thus:

"If the sale is a sale of things of quantity generally, and no right of property in the things agreed to be sold passes by the bargain from the vendor to the purchaser, time will in general be of the essence of the contract so long as the contract remains executory, and the purchaser will not be bound to accept and pay for the goods if they are not tendered on the day specified." (Contracts, p. 233.)

The reason for the above rule is in general to be found in the *perishable nature* of goods, and their *fluctuating price*, and this reason must be strengthened by the additional circumstance that, as here, the goods were *for an army in the field.*

The authorities cited by the learned counsel for the claimant do not contradict such rule.

(*a*) Whilst the passage quoted by him from Mr. Benjamin speaks of *circumstances*, the *fair consideration* of which leads courts to regard performance at the time designated as a *condition precedent*, the above from Mr. Addison says, in effect, that the *circumstances* which mark the class of goods mentioned by him (being that under consideration) are some of those alluded to by Mr. Benjamin.

(*b*) Simpson *v.* Crippin (cited p. 4) differs materially from the present case in that the times of delivery, a

non-compliance with which were there relied upon as annulling the contract, were mere subordinate details of the general delivery stipulated for.

(*c*) Clark's case (cited p. 4) was upon a contract for work and labor in erecting a wall *upon the land* of the other party. The contractor went on to perform such work after the day fixed for its completion. This, of course, was no longer *executory*, and indeed belongs to a different class of cases—one in which the adequacy of damages as compensation for the breach is well established.

(*d*) Slater *v.* Emerson (p. 4) was a case like that of Clark, and therefore the court may have required *special circumstances* to show that there time was *of the essence.*

The reservation by the United States in the present case of a right—upon non-performance by the contractors—to go into the market and buy cloths at his expense, does not suggest that the contractor still retained a right after such non-performance to make such delivery himself, as is argued for the claimant. (Brief, p. 5.) The conclusion therefrom is the reverse.

It seems, therefore, that if nothing more had passed between the United States and the claimant than is contained in the original contract, no valid tender of the cloths could have been made after the 15th of December, 1864.

2. I submit that the oral communications between the claimant and the various officers of the United States named in the record do not warrant the present action.

Upon the present branch of the case I understand the facts to be that Jones, having failed to make delivery according to the contract, was told by Captain Perry,

then head of the clothing division of the Quartermaster's Department (see 13 Stat., 394) in February, 1865, *that he must furnish the goods, and that upon application to Captain Moulton sufficient time would be allowed to deliver them.* (Record, p. 9.) Thereupon early in March he contracted with Ballou & Co. to manufacture such cloths for him, and under that contract they delivered to him 51,801½ yards. Upon the 4th of April, 1865, Jones applied by letter to Moulton "for permission to complete the contract," but such letter having been referred to the Quartermaster-General, the request was refused, as being beyond his power. Afterward, about the last of April, Jones tendered to Moulton at Cincinnati 25,899¾ yards of the cloths specified in the contract, and Moulton refused to receive them because *the time for delivery had passed, and he had no notice of the time of the contract having been extended.*

Before remarking upon the law applicable to such state of facts, it will be proper to say that the cotemporaneous action of Jones shows that he took no such view of the effect of Perry's language above quoted, as is now insisted upon. It is said *now* that his language imported a command to Moulton, as his subordinate, to allow further time for delivery.

But such command was never communicated to Moulton.

If Perry's language, "*You must furnish the goods,*" &c., amounted to a proposal to extend the time of delivery, and was accepted as such by Jones, it is singular that Jones did not have such extension communicated to Moulton, with whom he had made the original contract, and to whom also he had to make delivery of the goods. If Jones relied upon that language he should have had

it so made known. He could not treat it as a sort of secret betwixt himself and Perry, and then, by making demands of other officers of the United States to whom it was unknown, put the United States in default *with respect to it.* His demand upon Moulton and upon the Quartermaster-General in April, 1865, was necessarily understood by them to have been *upon the footing of the original contract*, and not upon that of the so-called oral one with Captain Perry, of which they had never been notified; and therefore the claimant cannot now allege that the United States have refused to receive goods *offered to them under the* (supposed) *extension granted by Captain Perry.*

It seems plain that the gloss now sought to be affixed to the work of Captain Perry is an afterthought, the suggestion probably of acute counsel consulted some years afterward. Perry probably meant, and was understood, only to give *advice* to Jones, *i. e.*, his opinion of what the law required, and of what Moulton, upon application, would do.

In this connection it is to be observed that Perry's language was uttered in response to Jones's application—not for an extension, but for a *release.* It was therefore, at most, in the nature of a *proposal* by Perry for an extension—a proposal to which Jones at that time made no reply. In this view it is submitted that the present endeavor to make the claimant's subsequent transactions with Moulton play the part of an assent by him to Perry's proposal, is a piece of *reconstruction* more ingenious than sound. Upon the whole, however, as said above, the collocation shows rather that Perry's words amounted to an expression of his *opinion*, first, as to the law governing the situation, and secondly, as to Jones's

best method of extrication, viz, by making application to Moulton for a reasonable extension.

If Perry he had meant an order to Moulton, it would have been *communicated*, and have been in writing. Nor in such case would Jones have applied afterward to Moulton *for permission* to complete the contract. He would only have communicated Perry's previous permission, (that is, the order to himself to furnish the goods, and to Moulton to allow of their delivery).

Jones's failure at the time to publish what is now called Perry's *extension* of the time, is at once *contradictory* to the theory now set up as to Perry's meaning, and also *fatal* to any suit predicated upon the supposed breach of such contract for extension, because, as has been already said, neither of the officers whose action is said to amount to such breach had any information of its existence.

If Jones led Moulton to believe that the requests made by him, and the goods tendered by him in April, 1865, were made and tendered under the original contract, he cannot now, as it were, *reassign* such request and tender, by referring them to another contract at that time not in the contemplation of either party, and absolutely unknown to one of them. The United States are sufficiently exposed to the results of inadvertence by their agents without opening such a door as that suggested in the present case.

These remarks seem a sufficient reply to the claimant's case.

It is to be added, however, that the original contract with Jones was one within the act of 1862, which, as has been decided in Clark's case at this term, is a stat-

ute of frauds. The contract, therefore, could not in general be modified except in writing. How far an *oral extension of the time for performance* given by such contracts is valid is perhaps not definitely settled. Mr. Browne lays it down, in his book upon the statute of frauds, that *such oral extension, coupled with a performance, or a tender of performance, in conformity therewith*, is equivalent to a performance, or tender thereof, under the original requirement; and there is an intimation to the same purpose in Salomon's case (19 Wall., 17). I leave this part of the case to the effect of the observations made in the opinion of the learned court below (Record, p. 15), adding that recent cases in English courts show that the rule requiring contracts within the statute of frauds to be modified, if at all, *in writing*, is maintained by those tribunals quite as rigidly as ever. Noble *v.* Ward (L. R., 2 Ex., 135).

S. F. PHILLIPS,
Solicitor-General.